SUPREME COURT, U. S.

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JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 579

CURTISS-WRIGHT CORPORATION,

Petitioner,

against

BRANIFF AIRWAYS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE WARNER CLARK,
Attorney for Petitioner,
27 William St.,
New York, N. Y. 10005

TABLE OF CONTENTS

	PAGE
Opinions of the Court Below	2
Jurisdiction	2
Questions Presented	3
Statement of the Case	4
Reasons for Granting the Petition for Certiorari	4
Conclusion	10

INDEX TO APPENDIX

Opinion	A1
Order on Petition for Rehearing	A9
Order on Petition for Rehearing	A10
Order as to Bill of Costs	A11
Order Staying Mandate	A12
Affidavit of James F. Coughlin, Objecting to Taxation of Costs	A13
Affidavit of William E. Dow, Jr., as to Taxation of Costs	A17
Bill, Annexed to Foregoing Affidavit of Wilbur E. Dow, Jr.	A19
Receipt, Annexed to Foregoing Affidavit of Wilbur E. Dow, Jr.	A21
Affidavit of Wilbur E. Dow, Jr., in Support of Taxation of Costs	A22
Excerpt from Transcript	A24

TABLE OF CASES CITED.

	PAGE
Ark-Tenn Distributing Corp. v. Breidt, 209 F. 2d 359 (3 Cir. 1954)	5
Beran v. Whitmore, 5 So. 2d 748 Florida (1952)	6
Callwood v. National Bank, et al., 121 F. Supp. 379 (District Court, Virgin Islands 1954)	6
Dolfini v. Erie Railroad Co., 178 N. Y. 1 (1904)	8
Eisenberg v. Ortona Park Recreational Center, 160 So. 2d 132 (1964)	7
Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 S. Ct. 817 (1938)	3, 6
Fealey v. Bull, 163 N. Y. 397, 402 (1900)	8
Fitzpatrick v. International Railway Company, 252 N. Y. 127, 133 (1929)	6
Fourk v. Parish, 58 So. 2d 523 (1952)	6
Galloway v. United States, 319 U. S. 372, 63 S. Ct. 1077 (1943)	9
H. B. Zachry Co. v. O'Brien, 378 F. 2d 423 (10 Cir. 1967)	5
Hill, et al. v. Federal Trade Commission, 124 F. 2d 104 (5 Cir. 1941)	5
John Wanamaker v. Otis Elevator Company, 186 App. Div. 655, 175 N.Y.S. 78 (1919)	5
Matter of Harriot, 145 N. Y. 540, 545 (1895)	8
Presser Royalty Co. v. Chase Manhattan Bank, 272 F. 2d 838 (2d Cir. 1959)	9
Rowe v. Pennsylvania Greyhound Lines, 231 F. 2d 922 (2 Cir. 1951), cert. denied 350 U. S. 984, 78 S. Ct. 1052	3

PAGE

6345 Collins Avenue v. Fein, 95 So. 2d 577 Florida (1957) 6

Stock v. Gross, 186 So. 2d 827 Florida (1966) 7

Wiget v. Becker, etc., 84 F. 2d 706 (8 Cir. 1936) 5-6

Williams v. Howard Johnson's Inc. of Washington, 323 F. 2d 102 (4 Cir. 1963) 5

STATUTE CITED

28 U.S.C. Sec. 1254 (1) 2

RULES CITED

Rule 36 Federal Rules of Civil Procedure 3, 4, 6

Rule 39 Federal Rules of Appellate Procedure 9, 10

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No. .....

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against

BRANIFF AIRWAYS, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Petitioner Curtiss-Wright Corporation respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Second Circuit entered on the 19th day of May, 1969 affirming in part and reversing in part the judgment of the United States District Court for the Southern District of New York (and the appeal docketed in the said Court of Appeals, No. 32884-87) and the order of the said Court denying rehearing entered on June 16, 1969 and the order of the said Court denying rehearing in banc entered on June 16, 1969.

This Petition for a Writ of Certiorari is addressed to a review in the case of Braniff Airways, Inc. against

Curtiss-Wright Corporation and a review of the award of costs in the cases of Braniff Airways, Inc. against Curtiss-Wright Corporation and of Morton D. Stein as Executor of the Estate of Maurice Berg, deceased, against Curtiss-Wright Corporation.

Opinions of the Courts Below

The opinion of the Trial Court is set forth commencing at page 1069 of the trial record set forth *infra* at page A24; the opinion of the Court of Appeals for the Second Circuit is set forth *infra* at page A1. The opinion of the Court of Appeals denying rehearing is set forth *infra* at page A9. The opinion of the Court of Appeals for the Second Circuit denying rehearing *in banc* is set forth *infra* at page A10.

The Order of the Court of Appeals for the Second Circuit denying the motion to strike out the itemized and verified bill of costs filed by the appellants is set forth *infra* at page A11.

The Order of the United States Court of Appeals, Second Circuit granting appellee's motion for stay of a mandate is set forth *infra* at page A12.

Jurisdiction

Judgment of the Court of Appeals was entered on May 19, 1969. The order which denied the Petition for Rehearing was entered on June 16, 1969. The order which denied the Petition for Rehearing *in banc* was entered on June 16, 1969. The order denying the motion to strike out the bill of costs filed by appellants was entered on June 27, 1969. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

The order granting the stay of the issuance of the mandate pending application to the Supreme Court of the United States for a Writ of Certiorari was entered on the 30th day of June, 1969.

Questions Presented

1. Should this Court countenance the variance by the Court of Appeals from the holdings of other Federal Circuits as to the interpretation and weight to be given to admissions under Rule 36 of the Federal Rules of Civil Procedure, by its reversal of a trial judgment on the basis of alleged possibility of negligence occurring prior to the time that Braniff Airways, Inc. had judicially admitted the responsibility of its employee for the accident and where no proof was offered as to subsequently obtained knowledge and the admission was uncontroverted and unexplained at the trial?

2. Should this Court countenance the Court of Appeal's failure to apply the holdings of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 1938; *Rowe* v. *Pennsylvania Greyhound Lines*, 231 F. 2d 922, 2 Cir. 1951, cert. denied 350 U. S. 984, 78 S. Ct. 1052 and other cases requiring the application of state law in diversity cases while acknowledging that the judicial admission obtained from plaintiff pursuant to Rule 36, FRCP constituted evidence of contributory negligence and where the law of both New York and Florida requires that a trial court must direct a verdict against the plaintiff where there is undisputed evidence of contributory negligence?

3. Is the self-contradictory testimony of plaintiff's witnesses, not rehabilitated in the plaintiff's case, sufficient basis for submitting plaintiff's case to the jury?

4. Did the Court of Appeals abuse its discretion by awarding costs to Braniff Airways, Inc. when of the three causes of action brought by Braniff the decisions on two such causes of action were affirmed and one reversed?

5. Did the Court of Appeals abuse its discretion by denying a motion to strike out a bill of costs filed on behalf of Braniff when such bill of costs, although submitted and

filed by only the attorney for the appellant Braniff, included therein costs allegedly paid by Morton D. Stein, as Executor of the Estate of Maurice Berg, deceased, and Addabbo plaintiffs in separate actions which had been consolidated for trial and appeal?

Statement of the Case

The litigation of Braniff Airways, Inc., against Curtiss-Wright Corporation arose out of the crash on March 25, 1958 of a Braniff owned DC-7C aircraft, registration No. N5904, shortly after take-off at Miami, Florida. The airplane had left Dallas, Texas, the home base of Braniff, on a ferry flight to Miami. The aircraft was to subsequently depart for Panama City, took off at about 12:04 a.m. on March 25, 1958 and at an elevation of approximately 1,000 feet it is alleged that a fire was observed on the number 3 engine of the aircraft. Although the fire extinguishing valve was pulled and the general testimony of the witnesses was that the fire thereafter diminished, the airplane crashed. The pilot of the aircraft was Captain Thomas Donald George.

Braniff later discharged the pilot in command, Thomas Donald George, on the ground that Braniff found him responsible for the crash. Braniff sued for damages to the aircraft amounting to the alleged value thereof.

Reasons for Granting the Petition for Certiorari

1. The trial record of this case includes the following uncontroverted admission by Braniff made in accordance with a request for admission served pursuant to Rule 36 of the Federal Rules of Civil Procedure (Deft's Exhs. G1, H, Exhibit Volume 13, 16):

> "Plaintiff admits that on or about July 8, 1959 Braniff Airways, Inc. made a determination upon information then available that Captain Don George

was responsible for the accident at Miami, Florida on March 25, 1958 resulting in the destruction of DC-7C aircraft N5904 and death and injury to several passengers and crew members."

Pursuant to the same request for admission Braniff further admitted that as a result of such determination it terminated the pilot's employment and advised him on July 8, 1959 that the reason for termination was:

"Your responsibility as determined by the Company, for the accident at Miami, Florida on March 25, 1958 resulting in the complete destruction of Douglas DC-7C aircraft No. N5904 and death and injury to several of the passengers and crew members."

Applying both Federal and State law to this situation the proposition is well settled that a judicial admission of the type hereinabove quoted is binding upon the party making such admission. *John Wanamaker* v. *Otis Elevator Company,* 186 App. Div. 655, 175 N.Y.S. 78; *Hill, et al.* v. *Federal Trade Commission,* 124 F. 2d 104 (5 Cir. 1941), wherein the Court said:

" * * * but these rules aside, it is fundamental that judicial admissions are proof possessing the highest possible probative value. Indeed facts judicially admitted are facts established not only beyond the need of evidence to prove them but beyond the power of evidence to controvert them. A fact admitted by answer is no longer a fact in issue."

This interpretation of Rule 36, it is respectfully submitted, has been followed in practically every other Circuit throughout the Federal System. *H. B. Zachry Co.* v. *O'Brien,* 378 F. 2d 423 (10 Cir. 1967); *Williams* v. *Howard Johnson's Inc. of Washington,* 323 F. 2d 102 (4 Cir. 1963); *Ark-Tenn Distributing Corp* v. *Breidt,* 209 F. 2d 359 (3 Cir. 1954); *Wiget* v. *Becker etc.,* 84 F. 2d 706

(8 Cir. 1936); *Callwood* v. *National Bank et al.*, 121 F. Supp. 379 (District Court, Virgin Islands 1954).

It is pointed out to this Court that the opinion of the Court of Appeals in support of its determination to reverse recited evidence of Curtiss-Wright's negligence by setting forth causes and events all prior to July 8, 1959, the date of the judicial admission. It is further respectfully submitted that Curtiss-Wright had the right to depend upon the judicial admission made by Braniff and that it was error for the Circuit Court to base its reversal on alleged events of negligence prior to July 8, 1959.

2. The landmark case of *Erie Railroad Co.* v. *Tompkins, supra,* mandates the application of state law to the trial of a diversity action. The Court of Appeals in its opinion stated that the judicial admission obtained pursuant to Rule 36, constituted "evidence of contributory negligence" (A-5). It was, in fact, uncontroverted evidence of contributory negligence. The law is well settled in the States of New York and Florida that where undisputed evidence of contributory negligence is developed in the plaintiff's case there is no issue for the jury and the trial court must direct a verdict against the plaintiff. The law of New York set forth in *Fitzpatrick* v. *International Railway Company,* 252 N. Y. 127, 133 (1929), is that proof of freedom from contributory negligence is not merely a burden of proof but is a substantive part of plaintiff's right to recover. The slightest contributory negligence on the part of plaintiff bars recovery. The law of Florida is that if there is undisputed evidence of contributory negligence, there is no issue for the jury and the trial court must direct a verdict against plaintiff. See: *6345 Collins Avenue* v. *Fein,* 95 So. 2d 577 (1957); *Beran* v. *Whitemore,* 5 So. 2d 748 (1952); *Fourk* v. *Parish,* 58 So. 2d 523 (1952); *Stock* v. *Gross,* 186 So. 2d 827 (1966) and *Eisenberg* v. *Ortona Park Recreational Center,* 160 So. 2d 132 (1964).

The opinion of the Court of Appeals further stated that "Braniff could seek to rebut at trial" this evidence of contributory negligence. It is respectfully submitted to this Court that Braniff had one opportunity to rebut this evidence of its own contributory negligence and that no evidence of any nature was adduced as to any findings, causes or occurrences subsequent to the admission by Braniff of July 8, 1959. In these respects, the Court of Appeals violated the holdings of the *Erie* and *Rowe* cases, *supra,* and such violation, if affirmed, would require Curtiss-Wright to defend a cause of action for a second time, although Braniff did not sustain its burden of proof at the first trial.

3. It is respectfully submitted that the Court of Appeals erred in the specifications of negligence of Curtiss-Wright set forth in its opinion. These are discussed seriatim. (The numbers correspond to those used in the opinion) (A4).

1. Braniff's witness, Gregory, did testify as to the points noted here by the Court. He also testified exactly to the contrary when he said that the engine was a good reliable engine (Tr. 1563) and that in 1958 few engines were sufficiently reliable to be qualified for as much as 1000 hours between overhauls (Tr. 1476-77). This engine was qualified for 1,000 hours between overhauls at the time of its sale to Braniff which time was increased to 1,200 hours between overhauls on the application of Braniff to the C.A.A. without notice to Curtiss-Wright (Tr. 1478).

2. There was absolutely no evidence adduced anywhere in the record as to the fuel pump timing on the particular engine involved in the crash at the time of the crash and the evidence shows that Braniff had adjusted the fuel timing on the engines to their own configuration before the accident date (Deft's Ex. AF—Exhibit Volume p. 53).

3. There was absolutely no evidence as to the identity of the manufacturer of the fuel lines on the particular engine involved in the crash at the time of the crash. There was evidence that Braniff manufactured its own fuel lines (Tr. 1389) and further testimony that most of the fuel lines used by Braniff were bought from a source other than Curtiss-Wright (Tr. 1307).

4. The Court of Appeals accepted the testimony of plaintiff's expert, Ahlers, that the failure of the cylinder caused the crash. Ahlers later contradicted that statement when he testified,

> "The hypothetical stated that the cylinder broke at some time. I am making no assumption as to when it broke but at an asserted period it must have broken" (Tr. 1096).

It is submitted that Ahler's opinion that the cylinder failure caused the crash is incredible as a matter of law in view of his later testimony that the time when the cylinder failed was immaterial to his opinion.

Similarly, plaintiff's other expert witness, Gregory, admitted that he did not know where he obtained knowledge of the basic premise of his theory of cylinder barrel separation (Tr. 1474). While ordinarily the credibility of witnesses is for the jury there is an exception when the testimony of a witness "may be in such contradiction of matter of common knowledge or the laws of nature as to be incredible as a matter of law." *Fealey* v. *Bull*, 163 N. Y. 397, 402 (1900). See also *Matter of Harriot*, 145 N. Y. 540, 545 (1895); *Dolfini* v. *Erie Railroad Co.*, 178 N. Y. 1 (1904). Ahlers and Gregory admitted they had no personal knowledge of the facts of this accident.

It is respectfully submitted that such testimony was incredible as a matter of law and was not a sufficient basis

in and of itself for submission of plaintiff's case to the jury. The Court of Appeals itself has stated that:

> "Under the New York decisions, as would also be true where federal standards are to be applied, an issue ought not to be submitted unless there is evidence that ought reasonably to satisfy a jury that the fact sought to be proved is established." *Presser Royalty Co.* v. *Chase Manhattan Bank,* 272 F. 2d 838 (2d Cir. 1959). Cf., *Golloway* v. *United States,* 319 U. S. 372, 63 S. Ct. 1077 (1943).

5. The Notice of taxation of costs set forth in the Appendix, page A17, was submitted by the attorney for Braniff but purported to be on behalf of Braniff and Stein. The attorney for Stein is one W. Shelby Coates, Jr. and he filed no notice of taxation of costs. Motion was made by Curtiss-Wright to strike out the notice of taxation on the grounds that such taxation was an abuse of the discretion vested in the Court of Appeals as well as being contrary to the provisions of Rule 39 of the Federal Rules of Appellate Procedure. In the complaint of Braniff three causes of action were set forth, to wit, implied warranty, express warranty and negligence. The dismissal of the causes of action in implied warranty and express warranty was affirmed. The dismissal of the cause of action in negligence was reversed. An affidavit (A17) filed in support of the taxation of costs contains the following statement:

> "That the Notice to Tax Costs was made and filed pursuant to the following memorandum on file in the Clerk's office:
>
> 'May 28, 1969
> Memo to Daniel Fusaro
> From PRH
>
> Costs should be awarded to Braniff and Berg's Estate against Curtiss-Wright, and to Curtiss-Wright against Addabbo.
>
> PRH' "

The notice of taxation of costs was submitted only by the attorney for Braniff Airways. No substitution of attorneys in the Stein action has ever been made. It was urged in the motion that accordingly the notice to tax costs was defective on its face. Such motion was denied (A11).

It is respectfully submitted that the Court of Appeals abused its discretion and violated Rule 39 of the Federal Rules of Appellate Procedure and that action so far departed from the usual course of judicial proceedings as to call for the exercise of this Court's supervision.

CONCLUSION

The judgment in favor of respondent Braniff Airways, Inc. on its negligence cause of action should be set aside and the lower Court directed to enter judgment in favor of petitioner Curtiss-Wright with appropriate directions as to taxation of costs.

Respectfully submitted,

George Warner Clark,
Attorney for Petitioner,
27 William Street,
New York, N. Y. 10005.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 423-26—September Term, 1968

(Argued April 8, 1969 · Decided May 19, 1969)
Docket Nos. 32884-87

BRANIFF AIRWAYS, INC., PHILLIP ADDABBO, and MORTON D. STEIN, as Executor of the Estate of MAURICE BERG, deceased,

Plaintiffs-Appellants,

v.

CURTISS-WRIGHT CORPORATION,

Defendant-Appellee.

Before: Friendly, Kaufman and Hays, Circuit Judges.

Appeals from a judgment and an order of the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge*, (1) dismissing the complaints of plaintiffs in their actions in negligence, implied warranty and express warranty, arising out of an airplane crash and (2) denying plaintiff Braniff's motion to amend its complaint by adding as plaintiffs the flight crew of the airplane.

Reversed and remanded for trial on the negligence claims of Braniff and Berg's estate, otherwise affirmed.

WILBUR E. DOW, JR., New York, New York (Dow, Stonebridge & Wallace, New York, New York), *for Appellants Braniff and Addabbo*.

Opinion.

W. Shelby Coates, Jr., New York, New York, *for Appellant Stein,*
James F. Coughlin, New York, New York (Mendes and Mount, New York, New York, Ernest D. Kennedy, of counsel), *for Appellee.*

Hays, Circuit Judge:

Braniff Airways, Inc., Phillip Addabbo, and Morton D. Stein, as executor of the estate of Maurice Berg, appeal from a judgment of the United States District Court for the Southern District of New York dismissing their complaints in actions against Curtiss-Wright Corporation arising out of an airplane crash that occurred near Miami, Florida on March 25, 1958. Braniff also appeals from an order denying its motion to amend its complaint by adding as plaintiffs the flight crew of the airplane.

Braniff was the airline operating the plane which crashed. Addabbo and Berg[1] were passengers on the plane.

The gravamen of the complaints is that the crash was caused by the failure of an engine manufactured by defendant. Defendant sold the engine to Douglas Aircraft Co. about July 17, 1956; Douglas installed it in a Douglas DC-7C aircraft which it sold to Braniff and delivered on October 23, 1956. Sometime later Braniff removed the engine from this aircraft and installed it in the right inboard position of the Douglas DC-7C which crashed.

Braniff's action is based upon negligence and also breach of both express and implied warranty. Berg sued originally only on the ground of negligence. Later he commenced a separate action in implied warranty, his motion for leave to amend his complaint to assert that claim in the negligence action having been denied. *Berg* v. *Curtiss-Wright,*

[1] Berg died in the course of the litigation and Stein, executor of his estate, was substituted.

224 F. Supp. 236 (S.D.N.Y. 1963). Addabbo also sues on implied warranty. The cases were consolidated for trial together with certain related actions.[2] A jury trial was had, limited by agreement to the issue of liability.

At the end of the plaintiff's case, Curtiss-Wright made several motions which the court collectively treated as a motion pursuant to Rule 50(a) of the Federal Rules of Civil Procedure for a directed verdict. Curtiss-Wright also sought dismissal of the implied warranty claims on the ground that they were barred by the statute of limitations. The court directed a verdict for Curtiss-Wright on the issues of negligence and breach of warranty. It held that the claims of Berg and Addabbo based on implied warranty were barred by the statute of limitations.

We reverse the determination of the district court as to the claims sounding in negligence, holding that there was sufficient evidence of defendant's negligence to require submission of that issue to the jury. In all other respects we affirm.

I.

We are persuaded that there was sufficient evidence of Curtiss-Wright's negligence to take the case to the jury.

Examination of the engine in question after the crash revealed that the number eleven cylinder had failed, that it had separated from the engine, and that its wall was scuffed. A Curtiss-Wright employee testified that the cylinder wall showed evidence of "ladder cracking." There was testimony that overheating of a cylinder can cause scuffing and that scuffing can lead to ladder cracking and eventually to cracking of the cylinder barrel and its separation from the engine. A letter that Curtiss-Wright wrote to Braniff after the crash stated that the "cylinder

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[2] One of the related actions was a suit by Braniff against Douglas; it was discontinued during the trial.

barrel failures" occurring in the Curtiss-Wright engines were "apparently the result of high combustion chamber temperatures."

The evidence of Curtiss-Wright's negligence included the following:

(1) Curtiss-Wright increased the rating of the engines of this so-called E A series (the type of engine involved here) from the 3250 horsepower of the predecessor D A series to 3400 horsepower. Gregory, an independent engineering consultant, testified that the increase in horsepower raised the temperature in the cylinders, aggravating the scuffing problem and greatly affecting the reliability of the engine. He stated that a reasonable horsepower to take from the engine would have been 3250 rather than 3400.

(2) Curtiss-Wright admitted that the fuel injection pump timing used in the type of engine involved in the crash had caused cylinder temperatures higher than those occurring in a similar Curtiss-Wright engine that used a different timing.

(3) Gregory testified that the use of flexible fuel lines of different lengths to take fuel to the various cylinders caused the cylinders to receive unequal amounts of fuel, resulting in a "large variation" in the temperatures of the cylinders which produced scuffing in the high temperature cylinders.

(4) Gregory testified that the high temperatures in the cylinder caused its separation and Ahlers, another expert witness, testified that the failure of the cylinder caused the crash.

There was evidence that Curtiss-Wright was aware of the scuffing difficulty and knew of instances of cylinder barrel separation by July 26, 1957, nearly eight months before the crash, but took no effective action to remedy the problem.

In reaching our conclusion that there was sufficient evidence of Curtiss-Wright's negligence to require submission of the case to the jury, we do not find it necessary to adopt the rule of *Noel* v. *United Aircraft Corp.*, 342 F. 2d 232 (3d Cir. 1964), that a manufacturer is under a continuing duty to improve its product where "human safety" is involved. It is clear that after such a product has been sold and dangerous defects in design have come to the manufacturer's attention, the manufacturer has a duty either to remedy these or, if complete remedy is not feasible, at least to give users adequate warnings and instructions concerning methods for minimizing the danger.

II.

Curtiss-Wright contends that Braniff was contributorily negligent as a matter of law.

The principal basis for Curtiss-Wright's position is Braniff's admission that "on or about July 8, 1959, [Braniff] made a determination upon information then available that Captain Thomas Donald George [the pilot] was responsible for the accident . . ." and that it discharged him on this ground. There is no reason to believe that in holding the pilot "responsible" Braniff was applying the standard of care imposed by law. The admission states that the determination of responsibility was based on information available to Braniff by July 8, 1959. That date was more than eight months before the commencement of this action. Braniff may well have acquired further information during that period. The admission was merely evidence of contributory negligence which Braniff could seek to rebut at trial.

It is not necessary to record in detail certain other evidence of contributory negligence. We are convinced that all of this evidence presented an issue for the jury.

III.

We hold that the causes of action of Braniff, Addabbo and Berg based upon implied warranty are all barred by the statute of limitations. This makes it unnecessary for us to discuss the district court's decision to direct a verdict against Braniff on that cause of action.

Under New York law, the action by Braniff, an Oklahoma corporation, was untimely if it was barred by either the laws of New York or the laws of Florida. New York Civil Practice Law and Rules § 202 (McKinney 1963).[3]

The action was not timely under the Florida statute of limitation, Fla Stat. § 95.11(5)(e) (1967), as construed in *Creviston* v. *General Motors Corp.*, 210 S. 2d 755 (Fla. Dist. Ct. App. 1968)—a case of which the district court was apparently unaware when it ruled that the action was timely. *Creviston* holds that the period of limitation in an implied warranty action is three years and that the action accrues at the time of sale. We believe that New York would accept the holding of the Florida appellate court in *Creviston* as representing the law of Florida, particularly since it is in accord with New York law as to accrual of the cause of action. (See *infra.*) The engine was sold in 1956; therefore commencement of the suit in 1960 was not timely.

Berg and Addabbo were both New York residents; their implied warranty actions were thus subject to New York's six year statute of limitation. New York Civil Practice Law and Rules §§ 213(2), 202 (McKinney 1963). Under New York law, these actions accrued at the time of the sale in 1956. See *Schwartz* v. *Heyden Newport Chemical Corp.*, 12 N. Y. 2d 212, 215, 237 N.Y.S. 2d 714, 716, modified, 12 N. Y. 2d 1073, 239 N.Y.S. 2d 896, cert. denied, 374 U. S. 808

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[3] That Florida is the state where the cause of action accrued for purposes of N. Y. C.P.L.R. § 202 (McKinney 1963) is not contested.

(1963).[4] Since Berg commenced his action in 1963 and Addabbo commenced his in 1964, both actions were untimely. Nor would they be timely even if we were to accept the contention that the date of accrual is governed by Florida law; *Creviston* makes clear that Florida follows the New York rule.

IV.

Braniff claims that Curtiss-Wright made express warranties concerning the engine in two pamphlets: "Facts about the Wright Turbo Compound" and an engineering report on the "TC18 Engine Operating Margin." The foreword to the former publication states that its purpose is to "explain the principles of the turbine system." On the cover of the engineering report is the statement: "This report is for information only and does not supersede, cancel, or change applicable engine specification or operating instructions." The statements in these two informational pamphlets are not warranties.

V.

The district court denied Braniff's motion to amend its complaint by adding the members of the flight crew as

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[4] *Schwartz*, a case involving the sale and use of injurious medication, concerned the date of accrual of a negligence cause of action and an implied warranty cause of action; it held that the implied warranty action accrued at the time of sale and that the negligence action accrued when the medication was administered.

The *Schwartz* holding on implied warranty actions is not affected by the recent New York Court of Appeals 4-3 decision in *Flanagan* v. *Mount Eden General Hospital* (April 17, 1969) (not yet reported). *Flanagan* holds that in medical malpractice actions for negligence, involving the insertion of a foreign object into a patient's body, the cause of action does not accrue until the object is discovered. The court discussed *Schwartz* but was concerned only with its holding regarding the accrual of the negligence action. The court in *Flanagan* distinguished *Schwartz* and clearly limited Flanagan's application to foreign object malpractice cases.

plaintiffs. It appears that even if the requested amendment were made, the complaint would not state a cause of action on behalf of the crew. If that is the case, the denial was irrelevant. In any event, the motion in substance is one to permit the crew to intervene. Braniff could not properly make this motion; it must be made by the parties seeking to intervene. Rule 24(c), Federal Rules of Civil Procedure.

VI.

We wish to record our disapproval of the parties' disregard of the provisions of the Federal Rules of Appellate Procedure. Although Rule 30 does not require that the parties agree on the contents of an appendix, it explicitly requires the filing of a single appendix. The parties chose instead to file an appellants' appendix and an appellee's appendix. Thus, in order to consider a given witness' testimony in this highly technical case, it was necessary for us to jump from one appendix to the other. The rule requring a single appendix was adopted to facilitate our task of judicial review.

Appellants also failed to reproduce in their appendix the two pamphlets, Exhibits 5 and 15A, on which they rely to establish a cause of action for breach of express warranty.

Litigants are advised to consider these remarks as a warning of the possibility of more drastic action by the court in the future.

Affirmed as to all issues *except* the *causes of action for negligence;* as to these reversed and remanded for a new trial.

Order on Petition for Rehearing.

32884-87

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

BRANIFF AIRWAYS, INC., PHILLIP ADDABBO, and MORTON D. STEIN, as Executor of the Estate of MAURICE BERG, Deceased,

Plaintiffs-Appellants,

v.

CURTISS-WRIGHT CORPORATION,

Defendant-Appellee,

(and 3 other cases).

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY
Henry J. Friendly

IRVING R. KAUFMAN
Irving R. Kaufman

PAUL R. HAYS
Paul R. Hays
Circuit Judges

June 13, 1969

Order on Petition for Rehearing.

32884-87

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

BRANIFF AIRWAYS, INC., PHILLIP ADDABBO, and MORTON D. STEIN, as Executor of the Estate of MAURICE BERG, Deceased,

Plaintiffs-Appellants,

v.

CURTISS-WRIGHT CORPORATION,

Defendant-Appellee,

(and 3 other cases).

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

June 13, 1969

Order as to Bill of Costs.

32884-7

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 27th day of June, one thousand nine hundred and 69.

BRANIFF AIRWAYS, INC., PHILLIP ADDABBO, and MORTON D. STEIN, as Executor of the Estate of MAURICE BERG, Deceased,

Plaintiffs-Appellants,

v.

CURTISS-WRIGHT CORPORATION,

Defendant-Appellee,

(and 3 other cases).

It is hereby ordered that the motion made herein by counsel for the appellee, Curtiss-Wright Corporation, to strike the itemized and verified Bill of Costs filed by appellants be and it hereby is denied.

PAUL R. HAYS, U.S.C.J.
Paul R. Hays (U.S.C.J.)

June 27, 1969.

Order Staying Mandate.

32884-7

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 30th day of June, one thousand nine hundred and 69.

BRANIFF AIRWAYS, INC., PHILLIP ADDABBO, and MORTON D. STEIN, as Executor of the Estate of MAURICE BERG, Deceased,

Plaintiffs-Appellants,

v.

CURTISS-WRIGHT CORPORATION,

Defendant-Appellee,

(and 3 other cases).

It is hereby ordered that the motion made herein by counsel for the appellee to stay the issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari be and it hereby is granted subject to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

J. EDWARD LUMBARD
J. Edward Lumbard

PAUL R. HAYS.
Paul R. Hays
Circuit Judges

Affidavit of James F. Coughlin, Objecting to Taxation of Costs.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

(Argued April 8, 1969)

Docket Nos. 32884-7

BRANIFF AIRWAYS, INC., PHILLIP ADDABBO and MORTON D. STEIN, as Executor of the Estate of MAURICE BERG, Deceased,

Plaintiffs-Appellants.

against

CURTISS-WRIGHT CORPORATION,

Defendant-Appellee.

STATE OF NEW YORK)
CITY OF NEW YORK) ss.:

JAMES F. COUGHLIN, being duly sworn, deposes and says that he is associated with Mendes & Mount, the attorneys for the defendant-appellee Curtiss-Wright Corporation and submits this affidavit in opposition to a Notice to tax costs filed by the plaintiff-appellants in the above entitled action.

The various causes of action embraced in the appeal on behalf of the plaintiffs-appellants are as follows:

Braniff Airways, Inc. — implied warranty
express warranty
negligence

Affidavit of James F. Coughlin, Objecting to Taxation of Costs.

Addabbo	— implied warranty	
Stein, Executor	— implied warranty)	
	negligence)	2 actions
Braniff Airways, Inc.	— appeal from order denying motion to add additional plaintiffs.	

The decision of the Circuit Court of Appeals was as follows:

Braniff Airways, Inc.	— affirmed as to implied and express warranty
Addabbo	— affirmed as to implied warranty
Stein, Executor	— affirmed as to implied warranty
Braniff Airways, Inc.	— appeal from denial of order to add additional parties affirmed.

The causes of action in negligence of Braniff Airways, Inc. and Stein, as Executor, were reversed.

The results of the appeal, therefore, show affirmances as to five causes of action with reversals only as to the two negligence causes of action of Stein, as Executor and Braniff Airways, Inc. The preponderance for the taxation of costs, if such are allowable, is in favor of the defendant-appellee.

Rule 39 of the Federal Rules of Appellate Procedure for the United States Court of Appeals states that if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the Court.

Affidavit of James F. Coughlin, Objecting to Taxation of Costs.

It is respectfully submitted that the order and decision on the aforesaid appeals contains no reference to costs and it is further submitted that any allowances of costs to the plaintiffs-appellants in these appeals would be in violation of the rights of defendant-appellee as well as inconsistent with the rules of the Supreme Court of the United States which mandates in Rule 57 thereof that in all cases of affirmances of any judgment, cost shall be paid by the appellant.

It is further respectfully submitted that the Notice to tax costs submitted by Wilbur E. Dow, Jr., Esq. indicates that said attorney represents both Braniff Airways, Inc. and Morton D. Stein, as Executor of the Estate of Maurice Berg, Deceased, whereas Mr. Dow represents the appellants Braniff and Addabbo only with the appellant Stein being represented by one W. Shelby Coates, Jr. No substitution of attorneys has been filed and said Notice to tax costs is defective on its face.

Putting aside the question of the merits of any taxation of cost by plaintiffs-appellant, it is respectfully pointed out to the Clerk that Rule 39(c) of the Federal Rules of Appellate Procedure provides only for taxation of the cost of printing of necessary copies of briefs, appendices and other records authorized by Rule 30(f). The Notice to tax costs heretofore submitted by plaintiffs-appellants goes far beyond the cost of printing such records and so indicates. In addition, the request for docket fees in the sum of $100 is also erroneous since included apparently therein is the action of Addabbo, the two actions of Stein as Executor and the action of Braniff Airways, Inc. Based on the Court's affirmances of the Addabbo action and the separate action of Berg is implied warranty, no taxation of costs can be granted as to those items.

Under all the circumstances, it is respectfully submitted that any taxation of cost in this litigation against the de-

fendant-appellee would be in violation of the Rules of the Circuit Court of Appeals, Second Circuit, as well as the rules of the Supreme Court of the United States and would violate the rights of the defendant-appellee.

WHEREFORE, it is respectfully asked that the Notice to tax costs in favor of plaintiffs-appellants heretofore submitted to the Clerk of this Court be rejected.

.....

JAMES F. COUGHLIN

Sworn to before me this
day of June, 1969.

.....

Notary Public

Affidavit of William E. Dow, Jr., as to Taxation of Costs.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SEPTEMBER TERM 1968

Nos. 423-26

(Argued April 8, 1969 Decided May 19, 1969)

Docket Nos. 32884-87

BRANIFF AIRWAYS, INC., PHILLIP ADDABBO and MORTON D. STEIN, as Executor of the Estate of MAURICE BERG, Deceased.

Plaintiffs-Appellants,

vs.

CURTISS-WRIGHT CORPORATION,

Defendant-Appellee.

SIRS:

PLEASE TAKE NOTICE that the Plaintiffs-Appellants Braniff Airways, Inc. and Morton D. Stein as Executor of the Estate of Maurice Berg, Deceased, request the Clerk of the Court to tax costs in the sum of $3,440.01 as the costs of printing of the Brief and Appendix and Clerk's Docket Fee, as indicated by true copies of the bills annexed hereto

1.	Printing Brief and Appendix	$3,340.01
2.	Clerk's Docket Fees	100.00
	Total:	$3,440.01

Affidavit of William E. Dow, Jr., as to Taxation of Costs.

The undersigned, an attorney at law of the Southern District of New York, and a member of the bar of this Court, affirms that the disbursements above specified have been incurred and are reasonable in amount.

WILBUR E. DOW, JR.,
Attorney for Braniff Airways and Morton D. Stein, as Executor of the Estate of Maurice Berg, Deceased,
80 Broad Street,
New York, N. Y. 10004.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

WILBUR E. DOW, JR. being duly sworn, says that the foregoing costs are correct and were necessarily incurred in the captioned actions and that the services for which fees have been charged were actually and necessarily performed.

Dated: June 2, 1969.

WILBUR E. DOW, JR.

Sworn to before me this
2nd day of June, 1969.

AMY R. SANTORO,
AMY R. SANTORO,
Notary Public, State of New York.
No. 24-8762775 Kings County
Term Expires March 30, 1970

Bill, Annexed to Foregoing Affidavit of Wilbur E. Dow, Jr.

Telephone: BE 3-7744 Founded 1902

(SEAL)

New York, N. Y. 10007
4/11/69

Dow, Stonebridge & Wallace
80 Broad Street
New York, N. Y. 10004

To CHAS. P. YOUNG COMPANY, Dr.

PRINTERS

41 Chambers Street

Our No. 8403 Your No.

BRANIFF AIRWAYS, INC.

Against

CURTISS-WRIGHT CORPORATION

1/6/69—Composition and Printing 30 copies of Appellants' Appendix—213 pp. and Cover

1/16/69—10½ hours Remake and Author's alterations, 22 pp. of killed type and 3 revised proofs

1/20/69—5½ hours Author's alterations and 3 revised proofs

Bill, Annexed to Foregoing Affidavit of Wilbur E. Dow, Jr.

1/22/69—2½ hours Author's alterations		
	$2,594.60	
N. Y. Combined Tax	129.73	
Author's alterations	324.50	
		$3,048.83
1/ 6/69—Composition and Printing 40 copies of Appellants' Brief—21 pages, cover and Author's alterations		
	253.50	
N. Y. Combined Tax	12.68	
Author's alterations	25.00	
		291.18
		$3,340.01

(Delivered prior to 4/1/69)

Receipt, Annexed to Foregoing Affidavit of Wilbur E. Dow, Jr.

ORIGINAL

RECEIPT FOR PAYMENT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Office of the Clerk

Received from:

Name: Dow & Stonebridge
Address: 80 Broad St. NY NY 10004
Short Title: Stein v. Curtiss-Wright

Case No. 32886-7

Date: 10-29-68

Clerk's Fee for docketing case (32884-91) $50.00

Total $50.00

Deputy Clerk √

WILLIAM D. WHALEN

Affidavit of Wilbur E. Dow, Jr., in Support of Taxation of Costs.

18892

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Docket Nos. 32884-7

BRANIFF AIRWAYS, INC., PHILLIP ADDABBO and MORTON D. STEIN, as Executor of the Estate of MAURICE BERG, Deceased,

Plaintiffs-Appellants,

against

CURTISS-WRIGHT CORPORATION,

Defendant-Appellee.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILBUR E. DOW, JR., being duly sworn, deposes and says that he is a partner in the firm of Dow, Stonebridge & Wallace, the attorneys for the Plaintiff-Appellant, Braniff Airways, Inc. and Phillip Addabbo and submits this affidavit in support of a Notice to Tax Costs heretofore filed in the above entitled action on Monday, June 2, 1969.

That the Notice to Tax Costs was made and filed pursuant to the following memorandum on file in the clerk's office:

Affidavit of Wilbur E. Dow, Jr.

"May 28, 1969
Memo to Daniel Fusaro
From PRH

Costs should be awarded to Braniff and Berg's Estate against Curtiss-Wright, and to Curtiss-Wright against Addabbo.

PRH"

Your deponent would call to the attention of the Court that attorneys for Curtiss-Wright filed a Bill of Costs against Addabbo, but apparently overlooked the first part of the memorandum.

WILBUR E. DOW, JR.

Sworn to before me this
5th day of June, 1969.

AMY R. SANTORO,
Notary Public, State of New York.
No. 24-8762775, Kings County.
Term Expires March 30, 1970.

Excerpt From Testimony.

(In open court; jury not present.)

The Court: We will now take up the motions spread upon the record yesterday as addressed to the plaintiffs' case. We consider those motions and the arguments advanced pro and con yesterday afternoon as though they were repeated in toto at this particular time. We will consider them, in other words, with the same force and effect.

With reference to the disclaimer we have this to say:

Curtiss-Wright's contention that as against Braniff it is the beneficiary of the disclaimer clauses in the Braniff-Douglas purchase contract is without merit. That contract is binding only on the parties to it. Just as the passengers cannot be held bound by that contract, to which they are not parties, so Curtiss-Wright cannot be held to be a beneficiary thereof.

As to the judicial admission: Curtiss-Wright's claim that all causes of action should be dismissed on the ground that Braniff judicially admitted Captain George's responsibility for the accident prompts us to reiterate, in a sense, what we have already announced on a prior occasion, and to be succinct about it we adhere to our earlier ruling on this matter during the course of trial.

That motion by Curtiss-Wright and all the relevant motions thereto, the effect of which would be to strike the testimony because of the legal effect of that admission, are denied; in other words, the judicial admission is limited as already indicated by the Court without the necessity of repeating again.

The liability of a component part manufacturer:

Curtiss-Wright has moved for dismissal of the complaints on the ground that as a matter of law the manufacturer of a component part cannot be sued. We deny the motion.

Although the New York Court of Appeals in *Goldberg v. Kollsman Instrument Corp.*, 12 N. Y. 2d 432 (1963), did not think it necessary "for the present at least" to extend

implied warranty protection so as to hold the manufacturer of a component part (altimeter) liable to a passenger, we are not governed by the application of New York law on this issue. Rather, counsel have agreed, and we hold, that Florida law governs this particular issue.

The Florida case of *King* v. *Douglas*, 159 So. 2d 108, is not relevant to the issue. It concerns the liability of an assembler and does not adopt the *Kollsman* language as to the liability of a component part manufacturer. What is relevant, however, is the Florida case of *Power Ski of Florida, Inc.* v. *Allied Chemical Corp.*, 188 So. 2d 13, in which suit was permitted against the manufacturer of a component part. In fact the court noted that the product involved in *Power Ski* was neither a foodstuff nor a dangerous instrumentality. It appearing, therefore, that the Florida courts would permit the manufacturer of a component part to be sued in an action involving a non-dangerous instrumentality, we hold *a fortiori* suit may be maintained against the manufacturer of an engine for an airplane, which is a dangerous instrumentality.

We also note that even under New York law, the *Kollsman* decision might not be applicable to a component as vital as an engine. See *Paris* v. *General Electric Co.*, 54 Misc. 2d 310, 282 N.Y.S. 2d 348 (Sup. Ct. 1967) (Saypol, J).

Now we come to Curtiss-Wright's motion to dismiss Braniff's complaint as to breach of warranty on the ground that such cause of action is barred by all applicable statutes of limitation.

Looking to New York law to determine the applicable statutes of limitation, we find that Section 202 of the CPLR provides that:

"an action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued . . ."

Excerpt From Testimony.

Curtiss sold the engine to Douglas in July of 1956 and Douglas sold the plane housing this engine to Braniff in October of 1956. Braniff's amended complaint was filed on April 12, 1960. Braniff is an Oklahoma corporation.

Braniff's cause of action is timely under New York's six year statute of limitation. The question remains, however, as to whether it is timely under Florida law—the state where both parties agree the cause of action accrued.

Section 95.11(5)(c) of Florida's laws permits an action "upon a contract, obligation, or liability not founded upon an instrument or writing" to be brought within three years, while Section 93.14(4) provides a four year period for "any action for relief not specifically provided for in this chapter." This includes tort actions.

The nature of a manufacturer's liability to third parties was stated by the Florida Supreme Court in *Green* v. *American Tobacco Co.*, 154 So. 2d 169, to be "the undertaking or agreement; attributed by law to be responsible in the event the thing sold is not in fact merchantable or fit for its ordinary use or purposes." In *McLeod* v. *W. S. Merrell Co.*, 174 So. 2d 736, the court summarized *Green* as a case which applied a rule of absolute or strict liability to the manufacturer.

"In the absence of Florida decisions directly on point, we think the New York Court of Appeals would think that the Supreme Court of Florida would think" that the four year statute of limitation is applicable to Braniff's cause of action for breach of warranty. The quote just given is from *George* v. *Douglas* heretofore cited.

We are aware that in *Public Administrator of New York* v. *Curtiss-Wright Corp.* we stated that an action for breach of implied warranty has been characterized by Florida courts as *ex contractu* citing the 1951 case of *Whitley* v. *Webb's City, Inc.*, 55 So. 2d 730. Since our opinion, however, the Florida cases previously cited have come down

raising some doubt in our minds as to whether Florida would still characterize it as *ex contractu.*

While not totally convinced, we do feel with a fair degree of certainty—that Florida would apply its four year period to this cause of action.

Accordingly, whether this cause of action accrued under Florida law at the time of delivery of the engine or at the time of the crash, March 25, 1958 Braniff's action was timely instituted.

That motion is denied.

We come now to Curtiss-Wright's motion to dismiss the complaints of Berg and Addabbo alleging breach of implied warranty on the ground that such causes of action are barred by all applicable statutes of limitation.

This is a diversity action requiring this court to look to New York law to determine the applicable statute of limitations. Section 202 of the New York CPLR states that where a cause of action accruing without the state "accrued in favor of a resident of the state the time limited by the laws of the state shall apply." New York applies a six year statute of limitation to actions for personal injuries based upon breach of warranty. In New York, a cause of action for breach of warranty accrues at the time of sale or delivery. *See Liberty Mutual Insurance Co. v. Sheila-Lynn, Inc.*, 57 N.Y.S. 2d 707, affirmed, 61 N.Y.S. 2d 373, leave to appeal denied, 62 N.Y.S. 2d 601; *Kakargo v. Cranga Silo Co.*, 204 N.Y.S. 2d 1010, appeal denied, 207 N.Y.S. 2d 435. We refer you also to footnote 2 on page 75 of Judge Friendly's opinion in *George v. Douglas* reported in 332 F. 2d.

Curtiss-Wright sold the engine here in question to Douglas in July of 1956 and Douglas sold the plane housing this engine to Braniff in October of 1956. Berg instituted his action for breach of warranty against Curtiss on December 23, 1963, and Addabbo instituted his action

for breach of warranty against Curtiss on March 24, 1964. Both Berg and Addabbo were New York residents at all times here relevant.

On that issue of the residency of Berg and Addabbo, we observe that we heretofore decided in *Public Administrator of New York* v. *Curtiss-Wright Corp.* that no convincing proof had been presented at that time to convince us that the plaintiffs there involved were New York residents. Reliance on that case as authority for when a cause of action for breach of warranty accrues in New York or as to whether New York would apply Florida law in determining the date of accrual is misplaced; it does not constitute the law of the case on such questions.

Applying New York's six year statute of limitations, we find that whether we hold the action to have accrued at the time of sale or delivery of the engine by Curtiss to Douglas, or at the time of sale or delivery of the plane by Douglas to Braniff, the causes of action for breach of warranty of both Berg and Addabbo are untimely, and are therefore barred.

We find no merit to plaintiffs' assertion that Florida law governs the issue as to when the causes of action accrued. Assuming Florida law holds that these causes of action for breach of warranty accrued at the time of the crash, March 25, 1958, we are convinced that the New York Court of Appeals would apply its own rule as to the accrual of an action for breach of warranty. Plaintiffs have not cited, nor has our own research disclosed, any case—in or out of New York—in which a court applied its own statutory period but looked to the law of another state to determine when that period commenced to run. We are firm in our belief that New York would apply its whole body of limitations law and not turn to Florida law to determine when these causes of action accrued.

Excerpt From Testimony.

Accordingly, we grant the motions addressed to the dismissal of the causes of action asserted by Addabbo and Berg on the basis of implied warranty.

We now come to the application for a directed verdict made by the defense under Rule 50(a), of the Federal Rules of Civil Procedure.

We treat Curtiss-Wright's motions made at the end of plaintiffs' case as a motion for a directed verdict against each plaintiff both as to negligence and breach of implied warranty.

We have heeded the warning to the trial judge not to take from the jury the resolution of facts no matter how faint in outline they appear to be. We have struggled with the search as to whether, so far in the trial record, barely sufficient factual material has been adduced to warrant us to so conclude. We have a further consideration of unfairly imposing upon the defendant the time and expense which the introduction of evidence would entail, and still further whether we could, in all good conscience, so necessitate it.

We feel constrained to add parenthetically that such is the state of the trial record compiled by plaintiffs to this point that their alleged factual recital is so saturated with unexplained technical words and phrases as to make large segments either most difficult or entirely incomprehensible to lay triers of fact struggling to fulfill their mission: the promise of clear and convincing proof most certainly has not been fulfilled; it is not reasonable to expect them to extract sufficient understanding upon which to predicate findings of fact.

Pertinent to the resolution of this motion is the concurring opinion by Mr. Justice Frankfurter in *Wilkerson v. McCarthy*, 336 U. S. 53 (1949):

"When a plaintiff claims that an injury which he has suffered is attributable to a defendant's negligence—want of care in the discharge of a duty which the defendant

owed to him—it is the trial judge's function to determine whether the evidence in its entirety would rationally support a verdict for the plaintiff, assuming that the jury took, as it would be entitled to take, a view of the evidence most favorable to the plaintiff. If there were a bright line dividing negligence from non-negligence, there would be no problem. Only an incompetent or a wilful judge would take a case from the jury when the issue should be left to the jury. But since questions of negligence are questions of degree, often very nice differences of degree, judges of competence and conscience have in the past, and will in the future, disagree as to whether the proof in a case is sufficient to demand submission to the jury. The fact that a third court thinks there was enough to leave the case to the jury does not indicate that the other two courts were unmindful of the jury's function. The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge."

Viewing all of the evidence adduced on the plaintiffs' case in a light most favorable to the plaintiffs, it is clear that the facts, and the inferences to be drawn therefrom, point so strongly in the direction of no liability on the part of Curtiss-Wright as to negligence and breach of implied warranty that reasonable men could not reach a different conclusion. In view, therefore, of the absence of proof by plaintiffs on elements material to their negligence and breach of implied warranty causes of action, we hold that defendant Curtiss-Wright is entitled to judgment as a matter of law.

According, we must grant the motion and order judgment to be entered for Curtiss-Wright.

We conclude by saying that judgment is to be entered in favor of Curtiss-Wright against Braniff and Berg on

their causes of action based on negligence and breach of implied warranty and against Addabbo on his claim for breach of implied warranty.

Gentlemen, I now propose to call the jury in and tell them, without assigning reasons, that their function here is no longer required. I will then excuse them. I do not think it is necessary for me to tell them what has happened. Unless there is any suggestion to the contrary, that's what we shall now do.

Mr. Clark, bring the jury in.

Mr. Coates: Your Honor, on behalf of Mr. Stein I take exception—

The Court: That's automatic under the federal practice. An exception is noted to everything I have said adverse to the plaintiffs.

(Jury present.)

The Court: Mr. Foreman and members of the jury: The matter has come to a close and the need for your remaining in this case as jurors has ended. It is not necessary to take your time to explain what has precipitated this announcement. Suffice it to say that counsel join me in thanking you for your undivided attention and for the concern that you evinced from the time you took your oath as jurors up to this very moment. It was clear throughout that you were straining to understand what was going on; that you were ever mindful of your obligation and that you were doing your utmost to fulfill it.

The Clerk tell me that there will be no need for you to report for the balance of the term. I thank you again and excuse you so that you have an official record that you do not have to return in this case.

Thank you.

(Jury excused.)